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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In re

Amendment of Part 74 of the  
Commission's Rules with Regard  
to the Instructional Television  
Fixed Service

MM DOCKET NO. 93-24

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

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COMMENTS OF AMERICAN TELECASTING, INC.

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## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	i
I. DISCUSSION.....	2
A. Window Filing System.....	2
B. Financial Qualifications.....	3
C. Application Caps.....	7
D. Expedited Consideration of Applications.....	9
E. Assignment of Construction Permits.....	10
F. Frequency Offset.....	11
G. Major Modifications.....	12
H. Reasonable Assurance of Receive Sites.....	13
I. Accreditation of Applicants.....	14
II. CONCLUSION.....	15

## **SUMMARY**

In its Comments filed in response to the Commission's recent Order and Further Notice of Proposed Rulemaking in the captioned proceeding, American Telecasting, Inc. ("ATEL"), the nation's largest wireless cable operator, supports many of the changes to the ITFS rules and policies proposed by the Commission. Replacement of the current A/B cut-off application processing system with one instituted by a series of routinely scheduled filing windows will deter speculative filings and allow the staff to control the intake of ITFS new and major change applications. These changes, along with the other proposed rule modifications discussed by ATEL in its Comments, will expedite the FCC's processing and grant of such applications. This, in turn, will enhance the ability of ITFS licensees and the wireless cable operators with which they have contracted to provide much-needed service to the public.

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**COMMENTS OF AMERICAN TELECASTING, INC.**

1. American Telecasting, Inc. ("ATEL"), by its attorneys, hereby submits its Comments in response to the Commission's Order and Notice of Proposed Rulemaking, FCC 94-148, in the above-referenced proceeding released on July 6, 1994 ("NPRM"). Therein, the Commission examined its rules and policies governing the acceptance and processing of applications for new and major changes to Instructional Television Fixed Service ("ITFS") stations.

2. As a public company that is the country's largest provider of wireless cable service, ATEL has developed and is operating such systems in numerous markets. ATEL has been adversely impacted by the abuses to the Commission's processes by speculative ITFS applicants and licensees. These abuses have also caused substantial delays in the Commission's processing of applications, which have greatly compromised ATEL's ability to launch wireless cable systems and to provide service to the public. As such, ATEL welcomes the Commission's examination of its ITFS rules and policies. For the following reasons, because many of the changes proposed in the NPRM will provide substantial public interest benefits, they should be adopted without delay.

I. DISCUSSION

A. Window Filing System

3. ATEL enthusiastically supports the Commission's proposal to accept applications for new ITFS facilities, for major changes in existing facilities and major amendments to pending applications only during pre-announced filing "windows". The current A/B cut-off system has encouraged the filing of speculative applications and has delayed the processing and grant of bona fide ITFS applications. This has stymied efforts by legitimate educators to utilize the ITFS frequencies and by wireless cable operators such as ATEL to accumulate the number of channels necessary to provide viable competition to coaxial cable operators.

4. However, unless window notices are released by the Commission on a regular basis, the efforts of educators and wireless cable operators to provide service to the public will be substantially compromised. As such, ATEL urges that the Commission commit itself to issuing such window notices on a regular, scheduled basis, at least once every three months. By establishing regularly scheduled windows, schools considering making such applications, as well as wireless cable operators coordinating system development, can routinely anticipate when the next window will occur.

5. By adding such predictability to its ITFS processes, the Commission will also avoid the "gold rush" mentality that historically strikes potential applicants when filing windows are only infrequently opened. Because such applicants will know that, if they miss a particular window, the next will occur three months

later, they will be less inclined to panic and flood the Commission with applications. Such a system will also provide the FCC's staff with a volume of applications filed on a more constant basis, thus evening out the Commission's processing workload.

B. Financial Qualifications

6. At present, a new ITFS applicant is required only to certify that it is financially qualified to construct and operate its proposed facility. See FCC Form 330, Section III. In its NPRM, the Commission proposed replacing this certification with the requirement that ITFS applicants provide, in their applications, detailed documentary proof of their financial ability to construct and operate. However, the Commission noted that adoption of such a requirement would entail significant costs, both upon applicants in compiling such documentation and upon the FCC's staff in reviewing such submissions. The Commission also observed that the imposition of such a requirement could become the basis for the filing of frivolous petitions, requiring yet additional staff time for disposition and further delaying the grant of applications.

7. ATEL agrees that the Commission's ITFS rules should be revised to deter the filing of speculative applications by applicants with no financial means by which to construct and operate their proposed facilities. ATEL has had first-hand experience with ITFS licensees that have so filed with no financial means to construct and operate. Instead, these applicants apply with the Commission with the intention of "shopping around" their channels and obtaining financial backing only after their applications are granted. Such practices have disserved the public

interest by delaying the institution of service, clogging the FCC with deficient applications and precluding legitimate educators from obtaining station authorizations. Clearly, some remedial action by the Commission is necessary.

8. Nevertheless, ATEL also agrees with the Commission that requiring ITFS applicants to include detailed financial documentation in their applications may only further delay the application process without substantial public interest benefits. ATEL notes that, in 1981, the Commission replaced such a requirement of full financial showings by broadcast applicants with certification. Several years later, the FCC revised its processing procedures to avoid meritless certifications by such applicants and thus deter speculative filings. Similar action, at the outset, is appropriate here.

9. In 1981, in replacing the requirement that broadcast applicants submit detailed documentation of their financial qualifications with certification that they are financially qualified, the Commission emphasized that it was not, "in any way, modifying the underlying financial criteria" and provided the staff with the option to request additional financial information from such applicants if circumstances warranted. Revision of Form 301, 50 RR 2d 381, 382 (1981). The Commission has observed that this change to certification of financial qualifications "provides significant benefits both to applicants and to the Commission":

Applicants are spared the time and effort necessary to prepare and submit the documentation previously required to demonstrate their qualifications. Thus, their costs are reduced and the application submission process is accelerated. For its

part, the Commission does not have to expend the considerable time and effort necessary to analyze the previously required documentation, especially from the thousands of applicants which will not become Commission licensees. The staff's processing of applications is simplified and accelerated, and substantial Commission resources are therefore saved.

Certification of Financial Qualifications By Broadcast Applicants,

2 FCC Rcd 2122 (1987).

10. However, the Commission observed that, as a result of its experience during the five years after making this change, many broadcast applicants had certified their financial qualifications "without any basis or justification." It noted that such misconduct abuses the FCC's processes, wastes the resources of both the Commission and legitimate qualified applicants, thus delaying service to the public, and constitutes material misrepresentations to the Commission by the applicants. Accordingly, in 1987, the FCC directed its staff to institute procedures designed to detect and deter such abuses. Specifically, it initiated a program of random checks of financial qualifications as a part of staff application processing and ruled that, in cases in which an applicant has a large number of pending applications, the staff may question the validity of its financial certification. Thus, an applicant may be required by the staff to submit documentation and information supporting its certification, and proving that it has available the financial resources to construct and operate its proposed facility for three months. If such documentation reveals that the applicant's certification was false, the applicant may be disqualified for lack of financial qualifications and



misrepresentation to the Commission, and also subject to other sanctions provided for in the Communications Act and the Rules. Id.

11. ATEL believes that, particularly in light of the substantial number of schools relying upon wireless cable operators for financial support, similar procedures should be utilized with regard to ITFS applicants to deter speculators. Although Section III of FCC Form 330 currently requires ITFS applicants to financially certify, it is clear that many applicants have no comprehension of the significance of such certification.<sup>1/</sup> ATEL urges the Commission to revise the ITFS Form and accompanying instructions to make clear to applicants that, before so certifying, they must have before them documentation establishing the validity of such certification (i.e. an itemized breakdown of their anticipated costs of construction and initial operation, and documents establishing that they or the sources of funding upon which they rely have sufficient net current and liquid assets with which to meet those costs). The Form should confirm the Commission's intention to employ random checks to verify the validity of such certifications and to disqualify those applicants that have improperly so certified. It should also establish that applicants with multiple pending applications for new facilities and wireless cable entities committed to funding multiple applications must have sufficient finances to fund the aggregate cost of all such proposals in order to so certify. See George Edward Gunter, 60 RR 2d 1662, 1664 (1986).

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<sup>1/</sup> The instructions to the ITFS application contain no discussion of the financial certification called for in the application.

12. In this regard, because of the prevalence of educators looking to others for financial support, such as the wireless cable operators with whom they have contracted to lease excess channel capacity, the Form should require that, in such cases, the entity providing the financial support should also sign the application and certify that it has sufficient net current and liquid assets to meet the applicant's proposed costs. In cases in which this certification proves to be without basis, the Commission should take all appropriate actions against both the applicant and the falsely certifying party authorized by the Rules. Such actions would include possible dismissal of the wrongdoers' other pending applications, including other ITFS applications containing the certifying party's financial certifications, revocation of any authorizations held and the imposition of forfeitures.

C. Application Caps

13. In its NPRM, the Commission proposed to impose limitations upon the number of applications that may be filed during a particular window. Such a "cap" would prevent speculators from flooding the Commission with applications for new facilities throughout the country in an attempt to maximize their bargaining positions with legitimate wireless cable operators. For this reason, the FCC proposed a cap per-filing window of three to five applications by an individual non-local ITFS entity, and an additional cap of 25 applications associated with the same wireless cable entity. However, the Commission observed that, while the imposition of such caps might deter the filing of speculative applications and ease substantially the processing burden on the

FCC's staff, it may also retard the development of ITFS systems by depriving the wireless cable operators upon which they rely for funding the minimum number of channels necessary with which to operate.

14. ATEL supports the imposition of whatever numerical application limitations the Commission deems to be necessary and appropriate to prevent the continued flow of speculative applications. However, the Commission's concern about the potential stifling effect of such caps upon the development of the wireless cable industry is well founded. As a wireless cable operator that has secured the rights to channels in a number of markets and is developing numerous systems, ATEL would be substantially harmed by the FCC's rote imposition of such limitations.

15. Accordingly, ATEL proposes that the Commission exempt, from any such cap, applications for facilities filed by an applicant with a lease agreement with a legitimate operator that is running or developing a wireless cable system in the community at issue. ATEL proposes that such a determination of legitimacy be made utilizing a similar test to that which the Commission imposes upon wireless cable operators filing for vacant ITFS channels pursuant to Section 74.990(c) of the Rules. Thus, an ITFS application would not be counted toward the cap if the applicant has a lease(s) with a wireless cable operator that holds a conditional license, license and/or lease with the holder(s) of an authorization(s) for at least four MDS channels and has the authorization(s), an unopposed additional application(s) and/or has

a lease(s) with such licensees or applicants for at least four additional MDS or ITFS channels (not counting the application in question) to be used in conjunction with the facilities proposed in the ITFS application.

16. Moreover, any caps should relate only to applications for new facilities. In order to maximize the ability of wireless cable operators to seek whatever changes are necessary to the ITFS facilities that they are using in their systems to make their operations more efficient, no limitation should be imposed upon the number of modification applications or major amendments that may be tendered during a particular filing window.

D. Expedited Consideration of Applications

17. The Commission also proposed to provide expedited consideration of ITFS applications in return for the applicant's agreeing to an accelerated construction schedule. The purpose of such special processing would be to prioritize those applications that, if granted, propose facilities that would become part of a wireless cable system. Thus, in order to request such processing, the applicant would be required to demonstrate that its lessee already has a sufficient number of licensed MDS and ITFS stations to encompass a wireless cable system.

18. ATEL supports the Commission's adoption of this proposal. Because of the practical requirement that a wireless cable operator have access to a sufficient number of channels in order to provide viable competition to the coaxial cable operator in a given area, it often must delay construction of, and commencement of service by, other co-located facilities which the FCC has already

authorized, pending grant of an application for an additional ITFS facility critical to the operation of the proposed system. Because larger wireless cable operators such as ATEL routinely maintain a substantial inventory of equipment for their proposed facilities while awaiting such grant, such operators could easily commit to expedited construction by a date certain as the quid pro quo for such processing. The public interest would clearly be served by such expedited construction and operation of ITFS and MDS facilities by wireless cable operators to provide competition to cable companies. However, as the Commission observes at Paragraph 20 of the NPRM, if all applicants request expedited processing, the staff rate of review and grant of all applications will be slowed. ATEL proposes that the Commission avoid such potential gridlock by limiting such requests for expedition to applicants whose grant will result in facilities that will, in fact, become part of a wireless cable system whose construction is imminent. This can be done by imposing similar eligibility requirements to those proposed supra, for exemption from the calculation of application caps.

E. Assignment of Construction Permits

19. ATEL supports the FCC's proposed formalization of its policy limiting the allowable consideration for unbuilt ITFS facilities to the applicant's out-of-pocket expenses. ATEL also urges the Commission to review the application of its related rule limiting the allowable consideration for the dismissal of an ITFS application to the applicant's out-of-pocket expenses.

20. Specifically, in past cases, it has been common for a speculator to contract with a series of schools for excess channel

capacity by financing the preparation, filing and prosecution of their ITFS applications. The entity then demands payment from the mutually exclusive applicants and/or legitimate wireless cable operator in the area in exchange for the dismissal of its schools' applications. Because only the speculator, and not the schools themselves, will receive consideration for the dismissal of the schools' applications, there is no limitation upon the amount of consideration the speculator may seek to extort for such dismissal.

21. This state of affairs, which encourages the filing of speculative applications, is contrary to the spirit, if not the letter, of the pertinent FCC rules. The Commission should broaden the scope of those rules to include such non-applicant entities. Moreover, it should stringently enforce this limitation through careful review of the documentation provided to ensure that the consideration to be received for such dismissal does not exceed the legitimate and prudent expenses for the applications to be dismissed. Only through such enforcement will the Commission deter the speculators that have overwhelmed its limited processing resources with filings that were never intended to result in service to the public.

F. Frequency Offset

22. The Commission also proposes to require mutually exclusive ITFS applicants to utilize frequency offset to eliminate harmful interference in circumstances in which all affected transmitters are capable of handling offset stability requirements. At present, all affected applicants must mutually agree to so employ offset. While ATEL agrees that such a policy would serve

the public interest by accelerating the granting of applications and allowing a greater number of ITFS licensees, it is concerned that the continued application of the 28 dB D/U ratio standard to determine co-channel interference would be inappropriate.

23. Specifically, it has been the experience of ATEL that perceived interference commonly results with regard the signals of co-channel facilities operating at a 28 dB level. Consequently, ATEL urges the Commission to study and select what greater D/U ratio standard will, in fact, guarantee no such interference and employ such a standard in offset cases.

G. Major Modifications

24. ATEL also supports the Commission's expressed desire to revise its rules to specifically define what proposed changes to ITFS facilities will be deemed to be major. By doing so, the Commission will provide the applicants before it a consistent means by which to predict how their filings will be classified and treated by the staff.

25. In light of the FCC's recent consolidation of regulation of both ITFS and MDS to the Mass Media Bureau, the integration of ITFS and MDS facilities in wireless cable systems, and the technical relationship between such facilities, ATEL urges that the Commission consider conforming as many of its ITFS and MDS rules as possible, including those which define major applications and amendments. As a first step, ATEL proposes that the Commission revise the ITFS rule (Section 74.911) to conform with the pertinent MDS rules, namely Sections 21.41 and 21.42. Such a result will simplify the efforts of wireless cable operators to obtain the

necessary authorizations to allow co-location and also allow coordinated FCC processing and grant of all such applications on a market basis. Moreover, the Commission should consider the appropriateness of the major amendment classifications contained in those MDS rules in its upcoming proceeding regarding those rules and any changes be uniformly applied to both ITFS and MDS applications.

H. Reasonable Assurance of Receive Sites

26. In its NPRM, the Commission expressed its concern that ITFS applicants and licensees may request interference protection for receive sites that are so far from the proposed transmitter that they are beyond the area that can be served. Such licensees and applicants do so to artificially increase the service area of their wireless cable lessees. Thus, the Commission proposes that an applicant or licensee may not claim protection or eligibility based upon the specification of a receive site more than 35 miles from the transmitter.

27. ATEL has been a party to proceedings in which other applicants have so abused the Commission's processes by proposing receive sites that they technically cannot serve and accordingly believes that the Commission's concerns are well founded. However, the imposition of a "go-no-go" 35 mile standard may unfairly preclude service to receive locations that, due to the unique technical conditions present, may actually be served by a particular facility. As such, ATEL urges that the Commission make the 35 mile limit a rebuttable presumption, subject to the



applicant's showing that the site can, in fact, be served by the proposed station.

28. ATEL also supports the Commission's proposal to require an applicant to provide documentation demonstrating the legitimacy of its proposed receive sites. Applicants should be required to include in their applications a site letter from an authorized official of the school that operates the site confirming that it has so agreed and intends to receive programming at the site from the applicant's proposed ITFS station. Absent such a showing, the applicant should not be provided with interference protection with regard to the site in question. In order for the applicant to receive comparative credit for the site, the letter should also include the additional information required by Section 74.913(d)(4) of the Rules. All such letters should be included in the application, as amended, by the amendment deadline established by the Commission.

I. Accreditation of Applicants

29. Finally, ATEL supports the Commission's proposal that, in demonstrating that it is qualified to become an ITFS licensee pursuant to Section 74.932 of the Rules, an applicant should specifically identify which of it, its member schools and/or its proposed receive sites are accredited. However, ATEL disagrees with the NPRM's suggestion that an applicant should not receive interference protection for any receive site for which accreditation is not shown. Because the public also benefits from the availability of educational programming at unaccredited sites, as long as the applicant has provided the necessary documentation

demonstrating the availability of the site and its ability to serve the site, protection should be allowed.

II. CONCLUSION

30. For the foregoing reasons, ATEL supports many of the changes proposed by the Commission in its NPRM. Replacement of the current A/B cut-off application processing system with one controlled by a series of routinely scheduled filing windows will deter speculative filings and allow the staff to control the intake of ITFS new and major change applications. These changes, along with the other rule modifications discussed supra, will accelerate the processing and grant of such applications, enhancing the ability of ITFS licensees and the wireless cable operators with which they have contracted to provide much-needed service to the public.

Respectfully submitted,

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